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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 308

LESTER G. MADDOX, APPELLANT

v.

GEORGE F. WILLIS, JR., ET AL., APPELLEES

and

NICHOLAS DEB. KATZENBACH, ATTORNEY GENERAL, INTERVENOR-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraphs 1(a) and 1(c) of the Rules of this Court, Nicholas deB. Katzenbach, as intervenor-appellee, moves that the appeal be dismissed, or, alternatively, that the judgment of the district court be affirmed.

QUESTIONS PRESENTED

1. Whether a direct appeal to the Supreme Court lies from an order of a single judge holding appellant in contempt of an order of a three-judge district court convened pursuant to Section 206(b) of the Civil Rights Act of 1964.

2. Whether Title II of the Civil Rights Act of 1964 is unconstitutional.

782-959—65—

STATEMENT

This is a direct appeal taken from a final judgment entered by a single judge of the United States District Court for the Northern District of Georgia, holding appellant in civil contempt of the permanent injunction issued by a three-judge court on September 4, 1964. The appeal arises out of the Pickrick Restaurant litigation.[1]

On July 9, 1964, appellees George Willis, Jr., Woodrow T. Lewis, and Albert L. Dunn, filed a complaint in the Northern District of Georgia under Section 204 of the Civil Rights Act of 1964 seeking relief against appellant Lester G. Maddox for refusing them service because of their race in violation of Section 203 of the Act. The Attorney General was granted leave to intervene and filed a complaint seeking a preliminary and permanent injunction restraining appellants from continuing to violate the Act.

Pursuant to the request of the Attorney General, a three-judge court was convened. See Sections 206(a) and (b) of the Civil Rights Act of 1964, 78 Stat. 245, 42 U.S.C. 2000a–5. On July 22, 1964, the three-judge court upheld the constitutionality of Title II of the Civil Rights Act of 1964, as applied to the establishment in question. A preliminary injunction was issued restraining the Pickrick Restaurant and Lester Maddox from:

> (a) Refusing to admit Negroes to the premises of the Pickrick Restaurant upon the same

[1] The name of the restaurant was subsequently changed to the "Lester Maddox Cafeteria."

basis and under the same conditions that non-Negro members of the general public are admitted to the restaurant;

(b) Failing or refusing to sell food or meals and to provide service to Negro patrons upon the same basis and in the same manner that food, meals and services are made available to patrons of other races;

(c) Otherwise failing or refusing to make any of the goods, services, facilities, privileges, advantages or accommodations of the Pickrick Restaurant available to Negroes upon the same basis and under the same conditions that they are available to other races.

The court stayed the injunction until August 11, 1964, to allow appellants time to note an appeal and to seek a stay. Appeal was noted July 28, 1964, but has not been prosecuted. This Court denied a stay on August 10, 1964.

Shortly thereafter, appellees and the Attorney General filed motions to show cause why Lester Maddox and the Pickrick Restaurant should not be adjudged in civil contempt for violating the order of July 22, 1964. On August 25, 1964, Judges Bell, Morgan and Hooper finding "[n]o statutory basis * * * for the convening of a three-judge court to hear civil contempt proceedings ancillary to suits prosecuted under the Civil Rights Act of 1964" ordered "all further proceedings as they relate to the civil contempt proceedings to be heard by the district court in due and normal course in its ordinary jurisdiction," and dissolved, for that purpose, the three-judge court which had been convened August 13, 1964.

On September 4, 1964, the three-judge court[2] appointed to hear the main action granted a permanent injunction restraining Leste Maddox and the Pickrick Restaurant in terms identical to those of the temporary injunction. The hearing of the civil contempt proceeding was continued pending this Court's decision in *Atlanta Motel* v. *United States,* 379 U.S. 241, and *Katzenbach* v. *McClung,* 379 U.S. 294. In the interim, appellee and the Attorney General filed amended motions to show cause why appellant should not be held in civil contempt of the permanent injunction. After a three-day hearing, on February 5, 1965, Judge Hooper entered an order holding Lester Maddox and the Pickrick Restaurant in civil contempt of the permanent injunction of September 4, 1964.

The contempt order provides that if appellant refuses service to Negroes on the grounds of race or color, he shall pay a fine of $200.00 for each day that the restaurant or cafeteria has been open for business from the date of the contempt order to the date of the refusal, and that all fines so imposed shall be cumulated for the purpose of payment and collection. Provision is made for filing a statement of compliance which tolls the cumulative aspect of the order. Provision is also made for appellant to apply for an order declaring him to be purged of civil contempt.

ARGUMENT

1. Appellant argues that jurisdiction is conferred upon this Court by Section 206(b) of the Civil Rights

[2] The permanent injunction was enacted by a quorum of the court; Judge Tuttle was absent from the circuit.

Act of 1964, which authorizes a direct appeal to this Court from the final judgment of a three-judge court convened pursuant to Section 206(b).[3]

The short answer to appellant's contention is that the three-judge court which heard the main case was dissolved, insofar as the contempt proceeding is concerned, by the court's order of August 25, 1964, and the contempt proceeding was ordered "to be heard by the district court in due and normal course in its ordinary jurisdiction." This order was unquestionably correct. It is settled that an enforcement proceeding ancillary to a three-judge court order does not require a three-judge court. *Pendergast* v. *United States*, 314 U.S. 574; *Davis* v. *County School Bd.*, 142 F. Supp. 616 (E.D. Va.). Since the adjudication holding appellant in civil contempt of the injunction of September 4, 1964, was not an order of a three-judge court, Section 206(b) is inapplicable.[4]

2. In any event, in *Katzenbach* v. *McClung*, 379 U.S. 294, the constitutionality of Sections 201(a),

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[3] Appellant also cites *NAACP* v. *Alabama*, 357 U.S. 449, and *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, as supporting this Court's appellate jurisdiction. Those cases, however, were reviewed by writ of certiorari to the highest courts of the respective States.

[4] Even if it were appellant's contention that the district court erred in hearing the civil contempt proceeding without the assistance of two other judges, that contention is one which should be directed to the court of appeals and not to this Court. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Case* v. *Bowles*, 327 U.S. 927, affirming 149 F. 2d 777 (C.A. 9); *General Electric Co.* v. *Callahan*, 294 F. 2d 60 (C.A. 5), petition for certiorari dismissed, 369 U.S. 832; *Penagaricano* v. *Allen Corp.*, 267 F. 2d 550 (C.A. 1).

(b)(2) and (c)(2) of Title II was upheld as applied to a restaurant with annual local purchases of approximately $150,000. Even assuming that appellant could raise the question of constitutionality as a defense in the contempt proceedings although time for appeal from the three-judge court order had run, clearly, the applicability of Title II to appellant's restaurant, with annual purchases of food exceeding $250,000, raises no substantial constitutional question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court for the Northern District of Georgia be affirmed, or the appeal dismissed.

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